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IN THE
Supreme Court of The United States

OCTOBER TERM, 1980

JAN SCHAFFER,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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QUESTION PRESENTED FOR REVIEW

May a U.S. District Court judge, consistent with the First Amendment, hold a news reporter in contempt for refusing to disclose the identity of a news source and other confidential information,

a. When the remedy sought in the underlying proceeding--dismissal of an indictment for improper news leaks by the prosecution--is a remedy unknown in the federal courts and has no basis in law;

b. When the District Court had already obtained sufficient evidence to make a decision on the indictment dismissal motion; and

c. When the District Court had not attempted alternative solutions for determining whether the grand jury was affected by news reports, such as polling its members?

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INTEREST OF AMICUS CURIAE

Leave to file this brief has been granted amicus curiae by both the Appellant and the Respondent.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment interests of the public to know about the operation of all forms of government through its press.

I

STATEMENT OF FACTS

Beginning in mid-1978, the Department of Justice started a broad ranging investigation into allegations of official corruption.

The two-year secret investigation eventually involved hundreds of federal and state lawyers and investigators.

However, in early 1980, the news media began to get wind of pieces of the investigation. On February 2, 1980 NBC News, Newsday and The New York Times published the first ABSCAM reports.

The following day an article by Jan

Schaffer of The Philadelphia Inquirer, Petitioner in this Court, revealed that three Philadelphia City Councilmen, Harry P. Jannotti, Louis C. Johanson, and George X. Schwartz, and an attorney, Howard L. Criden, Respondents in this Court, were implicated in the ABSCAM investigation.

The publicity that followed was massive, but probably not as great as the pre-indictment news coverage in the "Watergate" cover-up,[1] Agnew[2] and Lance[3] cases.

Attorney General Benjamin R. Civiletti, Assistant Attorney General Phillip B.

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1. United States v. Mitchell, 397 F. Supp. 166 (D.D.C. 1974), aff'd sub nom. Ehrlichman v. Sirica, No. 74-1826 (D.C. Cir. Aug. 22, 1974) (en banc), application for stay denied, 419 U.S. 1310 (1974) (Burger, Circuit Justice); Haldeman v. Sirica, No. 74-1829 (D.C. Cir. Aug. 22, 1974) (en banc); Mitchell v. Sirica, No. 74-1878 (D.C. Cir. Sept. 20, 1974) (en banc), as reported in United States v. Haldeman, 559 F. 2d 30, 60 fn. 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

2. In re Proceedings of the Grand Jury (Agnew), Civ. No. 73-965 (D. Md. Sept. 28, 1973).

3. United States v. Lance, No. CR 79-134 A (N.D. Ga. May 23, 1979); In re Grand Jury Investigation (Lance) 610 F.2d 202 (5th Cir. 1980).

Heymann and Director of the FBI William H. Webster apologized and conceded that a substantial amount of the pre-indictment publicity came from law enforcement sources.[4/]

They announced efforts to trace the news leaks by ordering polygraph tests for federal personnel and by demanding signed waivers of confidentiality agreements between reporters and government lawyers.[5/]

The four defendants in this case were indicted on charges of racketeering and extortion.[6/] They moved to quash their

4. Address of the Attorney General of the United States Before the Department of Justice Employees, March 5, 1980 (statement of Benjamin R. Civiletti); Hearings on Oversight, FBI Undercover Operations Before the Subcomm. of Civil and Constitutional Rights of the House Judiciary Committee, 96th Cong., 2d. Sess. (March 4, 1980) (statements of Phillip B. Heymann and William H. Webster); Transcript of the Press Conference of the Honorable Benjamin R. Civiletti, Thursday May 29, 1980, 10:00 A.M., Department of Justice, Washington, D.C.

5. Marro, Injustice in Justice Dept. Polygraph Tests, Newsday, July 10, 1980, at 77, col. 1.

6. United States v. Criden, No. 80-166 (E.D. Pa. May 22, 1980) (indictments filed).

indictment on grounds of prosecutorial abuse, citing only the release of prejudicial publicity.[7]

The defendants allege that "the indictment should be dismissed due to the violation of the defendants' rights to an unbiased grand jury and that dismissal is additionally warranted and mandated on the grounds that prosecutorial misconduct of this nature demands vindication of the public's interest and the integrity of the judicial process."[8] (emphasis supplied).

To obtain evidence in support of this motion, the defendants subpoenaed nine reporters and editors : Leslie Maitland of The New York Times; Anthony Marro and Robert Greene of Newsday; William Small and Brian Ross of NBC News; Thomas Burton and Stuart Ditzen of The Philadelphia Bulletin; and Jim Smith and Jan Schaffer of The Philadelphia Inquirer.

The Inquirer and Ms. Schaffer filed a motion to quash the subpoena arguing that under the First Amendment a news reporter has the right to protect sources and unpublished information; and furthermore

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7. Motion to Dismiss Indictment on Grounds of Prosecutorial Misconduct and Prejudicial Pretrial Publicity, U.S. v. Criden, No. 80-166 (E.D. Pa. June 26, 1980).

8. Id. at 38.

that the defendants had made no showing that the information they seek from this reporter is relevant or critical to the underlying proceeding to dismiss the indictment.[9/]

The Inquirer and Ms. Schaffer pointed out that the government had already admitted that it was responsible for the news leaks and therefore that, in view of the First Amendment considerations, Ms. Schaffer could serve no useful purpose in the proceedings.[10/]

The U.S. District Court conducted a hearing. Peter Vaira, the U.S. Attorney for the Eastern District of Pennsylvania, testified that he had given Ms. Schaffer brief pieces of information on three separate occasions.[11/]

Ms. Schaffer was then called to the stand and asked to confirm whether she had used Mr. Vaira as a source. Ms. Schaffer declined to answer[12/] and said she

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9. Memorandum of Jan Schaffer and Jim Smith in Support of Motion to Quash Subpoenas, United States v. Criden, No. 80-166 (E.D. Pa. July 3, 1980).

10. Id.

11. See generally Findings and Order, United States v. Criden, supra note 6.

12. Petitioner's Brief for Certiorari at 4,

refused to act as an investigative arm of the Court, fearing that any confirmation (or denial) of Mr. Vaira as a source would lead to questions about the accuracy or inaccuracy of his testimony, would logically open the way to questions about all of her news articles and their sources and content, and might lead to a possible perjury proceeding.

The U.S. District Court held the reporter in civil contempt and imposed a six month jail sentence pending her compliance with the order to testify. The Court stayed the execution of the order pending an appeal to the U.S. Court of Appeals for the Third Circuit.

The U.S. Court of Appeals upheld the contempt citation. It declined to rule whether prosecutorial abuse by news leaks justifies the dismissal of an indictment which was the underlying basis for the whole contempt proceeding in this case. It merely said that the defendants "should be allowed to develop a full record to support their allegations of outrageous prosecutorial misconduct." United States v. Criden, 6 Med. L. Rptr. 1993, 1999 (3rd Cir. Oct. 10, 1980).

United States v. Criden, filed October 10, 1980.

Subsequently, the convictions of two of the defendants were reversed by the district court on grounds of entrapment and other prosecutorial misconduct not related to the disclosure of information to the media. The government has announced it will not prosecute the remaining two defendants. Thus, as noted in the Petition for Certiorari, this news reporter is the only person facing incarceration as a result of this criminal investigation.[13/]

The Department of Justice's Responses

In previous cases such as "Watergate", Lance and Agnew, the government opposed subpoenas to the news media in the district courts. In this case, the government did not oppose the subpoena and cooperated with the evidentiary efforts of the defendants to attack the indictment.

In the U.S. Court of Appeals, the Justice Department changed its position and filed a five page brief opposing the subpoena served upon Ms. Schaffer.[14/]

Before this Court, the Justice Department has declined to take any position, thus denying to this Court the

13. Id. at 5.
14. Brief for Appellee, United States v.

benefit of knowing the position of the United States.[15]

II

SUMMARY OF ARGUMENT

The defendants in this case are asking for the novel and unknown Fifth Amendment remedy of dismissing an indictment because of prejudicial news leaks from the prosecution--the same remedy which was unsuccessfully sought in the Agnew,[16] Lance[17] and "Watergate"[18] cases.

They argue that dismissal of the indictment is constitutionally required because they have a right to an "unbiased grand jury"[19] -- a grand jury unaffected by news reports.

Schwartz, No. 80-2001 (3d Cir. July 21, 1980).

15. Waiver by the United States of its right to file response, Schaffer v. United States, No. 80-915 (Dec. 18, 1980).

16. In re Proceedings of The Grand Jury (Agnew), supra note 2.

17. United States v. Lance, supra note 3.

18. United States v. Mitchell, supra note 1.

19. Motion to Dismiss Indictment on Grounds of Prosecutorial Misconduct and Prejudicial Pretrial Publicity and Memorandum of Law in

It is the position of your Amicus that no such constitutional right exists because the proceeding to dismiss the indictment has no basis in law.

Grand jurors -- as opposed to petit jurors -- are permitted to bring their personal prejudices and personal knowledge into the grand jury room, including their knowledge of news reports.

Furthermore, the impact on grand jurors of reading news reports improperly stimulated by the prosecution is too speculative a basis upon which to dismiss an indictment, even under the Third Circuit's reasoning in United States v. Serubo. 604 F.2d 807 (3rd Cir. 1979).

Even if there was some prejudicial effect on the grand jurors, a number of alternatives are available without resort to jailing a news reporter.

The trial judge can simply poll the grand jurors and ask them whether or not they were intimidated by news reports.

Or, as the Fourth Circuit suggested in a similiar case, careful voir dire and change of venue can be employed to protect the petit jury. United States v. Abbott Laboratories, 369 F. Supp. 1396 (E.D.N.C.

Support Thereof at 31, United States v. Criden, No. 80-166 (E.D. Pa. July 3, 1980).

1973), rev'd 505 F.2d 565 (4th Cir. 1974).

The use of these simple alternatives will protect the press' First Amendment right to report about the criminal justice system. This system is most difficult to monitor because of its inherent secrecy. For this reason, confidential sources and information play an absolutely essential role. Therefore, this Court should uphold this reporter's privilege to refuse to testify in this case under the First Amendment or under this Court's power to supervise proceedings before the lower courts.

In fact, what appears to be occurring in this case is an attempt by the District Court to pursue a disciplinary investigation of the U.S. Attorney's Office for improper news leaks to the press under the ruse of a non-existent Fifth Amendment right.

Certainly, a trial judge may institute separate proceedings after the trial is completed to determine whether ethical codes, court rules and other standards have been violated. But no such ethical proceeding has been started in this case.

The ultimate absurdity of this case is that two criminal defendants in this appeal have been acquitted; that the government has announced it will not prosecute the remaining two defendants and the only

person going to jail from this celebrated ABSCAM prosecution is a young woman reporter from The Philadelphia Inquirer.

If this Court does not now act, it will inevitably encourage similiar irrelevant and time-consuming proceedings in many highly publicized criminal cases in the future. Criminal defendants will be encouraged to attempt to shift the focus of their cases from their innocence or guilt to the relationship between the prosecutors and the press. Reporters and editors will go to jail. Publishers and broadcasters will pay fines. The First Amendment rights of the public to learn about the criminal justice process will be undermined to the detriment of all citizens.

III

ARGUMENT

THE NOVEL REMEDY SOUGHT IN THIS CASE--DISMISSAL OF AN INDICTMENT ON GROUNDS OF PREJUDICIAL PUBLICITY GENERATED BY THE PROSECUTION--HAS NO BASIS IN PAST OR CURRENT LAW.

BUT EVEN IF THERE WERE SOME BASIS FOR THIS PROCEEDING, THERE ARE A NUMBER OF ALTERNATIVE SOLUTIONS AVAILABLE TO THE DISTRICT COURT WHICH DO NOT REQUIRE FORCED DISCLOSURE OF INFORMATION BY THE PRESS.

THEREFORE, THE FINDING OF CONTEMPT AGAINST THIS NEWS REPORTER STEMMING FROM

THIS IRRELEVANT PROCEEDING SHOULD BE SUMMARILY REVERSED.

A. HISTORICAL BACKGROUND OF SELECTED MOTIONS TO QUASH INDICTMENTS AND SUBPOENA REPORTERS IN HIGHLY PUBLICIZED CASES: THE "WATERGATE", AGNEW AND LANCE SUBPOENAS TO THE PRESS.

Amicus believes it would be helpful to this Court to be reminded briefly of the three most celebrated previous cases in which efforts were made to subpoena news reporters as part of motions to block or dismiss indictments on allegations of improper news leaks stemming from prosecutorial misconduct.

The three cases involved subpoenas to news reporters by Former Vice President Spiro Agnew during a grand jury investigation of bribery and tax fraud charges;[20] by the "Watergate Cover-up" defendants after their indictments for obstruction of justice;[21] and by Former Director of the Office of Managment and Budget Bert Lance after his indictment for illegal banking transactions.[22]

In each of these cases there was

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20. In re Proceedings of The Grand Jury (Agnew), supra note 2.

21. United States v. Mitchell, supra note 1.

22. United States v. Lance, supra note 3.

massive and prejudicial national publicity prior to the issuance of the indictments. In each of these cases, the Justice Department vigorously opposed the subpoenas on the grounds that, for example, "grand jurors have considerable latitude in the kinds of material they consider" and even "if grand jury testimony is improperly disclosed, the appropriate remedy is to punish the wrong-doer for contempt and not to dismiss the indictment."[23/]

The "Watergate" case motions were rejected.[24/] The District Court said that the remedy is unknown even in view of the "unprecedented" publicity in the case.[25/] The Lance motions were also denied.[26/] The Agnew motions were never heard because the Vice President pleaded "no contest" to tax evasion charges on the

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23. Memorandum for the U.S. in Opposition to Defendants' Motions Relating to Pre-indictment Publicity and Alleged Violations of Rule 6(e) at 4,5, United States v. Mitchell, supra note 1.

24. United States v. Mitchell, 397 F. Supp. 166, 179 (D.D.C. 1974).

25. Id.

26. United States v. Lance, No. CR 79-134 A (N.D. Ga. May 23, 1979).

day the subpoenas were returnable.[27]

B. THIS PROCEEDING HAS NO BASIS IN LAW BECAUSE GRAND JURORS -- AS OPPOSED TO PETIT JURORS -- ARE PERMITTED TO BRING THEIR PERSONAL PREJUDICES AND PERSONAL KNOWLEDGE INTO THE GRAND JURY ROOM, INCLUDING THEIR KNOWLEDGE OF NEWS REPORTS.

The defendants in this case allege that they have a right to an unbiased grand jury. They claim that news leaks created a situation where:

> (T)he government, even before it had impanelled a grand jury and continuing throughout the subsequent grand jury investigations, intentionally precluded unbiased consideration of the cases by grand juries in violation of almost every conceivable legal and ethical standard.[28]

That is simply a misstatement of the law. It is clearly settled law that exposure of a grand jury to publicity unfavorable to an individual under investigation does not invalidate its proceedings. In fact, several courts have suggested that grand juries should be aware

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27. United States v. Agnew, No. 73-0535 (D. Md. Oct. 10, 1973).

28. Motion to Dismiss Indictment on Grounds of Prosecutorial Misconduct and Prejudicial Pretrial Publicity and Memorandum of Law in Support Thereof at 6,7, United States v. Criden, No. 80-166 (E.D. Pa. July 3, 1980). (emphasis supplied).

of news accounts.[29]

...(A)Grand Jury is not confined to a passive role, but may and often should proceed on its own initiative....

That it is induced to such action by newspaper reports forms a continuum with its historic function of ferreting out crime and corruption, and is in no way inconsistent with its duty to decide on and in accordance with the evidence adduced before it. United States v. Nunan, 236 F.2d 576, 593 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957) (emphasis supplied).[30]

"If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence." Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968).

This Court, in dealing with prejudicial publicity at both the pre-indictment and post-indictment stages, has reversed convictions, but has not ordered the indictments dismissed. Sheppard v.

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29. Branzburg v. Hayes, 408 U.S. 665, 701 (1972); Wood v. Georgia, 370 U.S. 375, 392 (1962); Costello v. United States, 350 U.S. 359, 362 (1956).

30. See Beck v. Washington, 369 U.S. 541 (1962); United States v. Osborn, 350 F.2d 497 (6th Cir. 1965), aff'd, 385 U.S. 323 (1966); Estes v. United States, 335 F.2d 609 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965).

Maxwell, 384 U.S. 333 (1966), Rideau v. Louisiana, 373 U.S. 723 (1963) Estes v Texas, 381 U.S. 532 (1965).

In fact, the only reported case Amicus can discover of an indictment dismissed by a federal trial court on grounds of prejudicial publicity stemming from government information abuse (an inaccurate Food and Drug Administration press release about the defendants) was overturned on appeal. Abbott Laboratories supra.

In that case, the Court of Appeals said:

> We accept, without question, that the pretrial publicity in this case was prejudicial and highly inflammatory...(W)e join in the district court's condemnation of this conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution...
>
> No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e., voir dire, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled." 505 F2d at 570-571.

C. THE IMPACT ON GRAND JURORS -- OF READING NEWS REPORTS IMPROPERLY STIMULATED BY THE PROSECUTION -- IS TOO SPECULATIVE A BASIS UPON WHICH TO DISMISS AN INDICTMENT.

The defendants' last claim was that the indictment should be dismissed as "the only appropriate remedy for prosecutorial misconduct by the federal government,"[31] even if the grand jury was not illegally prejudiced by news reports. They relied heavily on the U.S. Court of Appeals for the Third Circuit's decision in United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979), which held that an indictment could be dismissed for misconduct by the prosecutor in improperly questioning witnesses before a "captive audience" Grand Jury.

It would seem an extraordinary extension of direct causation to say that news reports -- or any other facts which the grand jury happens to learn away from the grand jury room -- should be the basis for dismissing an indictment if these facts can in any way be traced to the prosecutor.

To state that grand jurors in the outside world, in their homes and offices, are captives of news reports will subject every indictment to this First Amendment sideshow.

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31. Motion to Dismiss Indictment on Grounds of Prosecutorial Misconduct and Prejudicial Pretrial Publicity at 2, United States v. Criden, No. 80-166 (E.D. Pa. June 26, 1980).

This "captive audience" argument was recently rejected by this Court in Consolidated Edison Co. v. Public Service Comm, 48 U.S.L.W. 4776 (1980).

Similarly, potential and actual grand jurors -- who are readers of newspapers and viewers of television -- may, like the consumers in Consolidated Edison, simply turn the station off, turn the page, or ignore the report.

D. THE QUESTION OF ALLEGED GRAND JURY PREJUDICE CAN BE SETTLED BY POLLING THE GRAND JURY.

If this Court were to make the novel and unique ruling that prejudicial publicity can be the basis of dismissing an indictment, there is of course a relatively simple "best evidence" solution.

At the least, prior to enforcing a subpoena that infringes upon First Amendment rights, this Court should require the trial judge to poll the grand jury. If the grand jury says that it, in fact, was unfairly prejudiced by news reports from whatever source, then the appropriate remedy might be to dismiss the indictments.

If, on the other hand, the grand jury says it was not unfairly affected by news reports, then the indictment dismissal proceeding before the District Court should

be terminated. In either case, the contempt proceeding before the District Court becomes irrelevant because only the grand jurors know whether they were affected by news reports.

E. THE FIFTH AMENDMENT INDICTMENT DISMISSAL PROCEEDING BY THE DISTRICT COURT IN THIS CASE IS REALLY AN ETHICS INVESTIGATION OF NEWS LEAKS BY THE UNITED STATES ATTORNEYS OFFICE

Given the complete lack of legal precedent for this indictment dismissal proceeding, it seems clear to your Amicus that what the District Court judge is really doing is conducting an investigation of the U.S. Attorney's office for what the District Court believes were improprieties in the release of information to the news media. We certainly agree that the federal courts have the power to pursue reported incidents of misconduct by prosecutors. But that is a completely different and separate proceeding with different rights and obligations for all parties concerned. Even so, the District Court has before it enough evidence to make a determination as to whether disciplinary charges should be filed with the bar association officials.

Jailing news reporters and dismissing indictments is simply too high a price to pay when a perfectly effective alternative is available to the District Court.

CONCLUSION

Wherefore, your Amicus respectfully prays this Court to grant the Petition for Certiorari and summarily reverse the contempt and jail sentence imposed on this news reporter.

Respectfully submitted,

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